**LAU HUI SING**

**v.**

**WONG CHUO YONG**

HIGH COURT SABAH & SARAWAK, SIBU
HAMID SULTAN ABU BACKER JC
[DIVORCE PETITION NO: 33-15-2006]
9 JULY 2008

***FAMILY LAW:*** *Children - Maintenance - Application to vary terms - Whether husband petitioner demonstrated any material change or circumstance for variation - Non disclosure of husband petitioner's assets - Whether warranted a dismissal of application - Whether application oppressive against wife petitioner - Whether an abuse of process*

The application herein was made by the husband petitioner seeking for an order that the wife petitioner contribute RM450 or such other sum as the court may deem just and proper towards the maintenance of the three children and a further order that the Great Eastern Life Assurance (Malaysia) Berhad GE Life Education Planner taken out in the name of the wife petitioner be varied to the sole name of the husband petitioner or the joint name of the husband petitioner and/or the wife petitioner. The respondent opposed the application on the grounds that she was earning a small income and looking after her sick mother.

**Held (dismissing the application):**

**(1)** As a general rule, consent order even in a divorce matter must be rarely disturbed unless there are exceptional circumstances and that too clearly stated in the affidavit to warrant the intervention of the court for the benefit of the minor children. The first consent order herein was made less than two years ago and the ex-husband had not demonstrated in the affidavit any material change or circumstance to vary the order, taking into consideration there is a greater duty and responsibility for the father to maintain his children. (para 11)

**(2)** The ex-husband had not disclosed his assets, movable and immovable and this material non-disclosure warranted the court to dismiss the application *in limine*. The ex-husband's application was not only oppressive against the ex-wife, but was an abuse of process and warranted the court to initiate

A contempt proceeding on its own motion, as such non-disclosure of assets as well as the application without justifiable reasons attempts to undermine the dignity of the court and court proceedings. (para 11)

B **Case(s) referred to:**
*Gisela Gertrud Abe v. Tan Wee Kiat [1986] 2 CLJ 202; [1986] CLJ (Rep) 133 SC* ***(refd)***
*Minton v. Minton [1979] 1 All ER 79* ***(refd)***
*Parkunan Achulingam v. Kalaiyarasy Periasamy [2004] 7 CLJ 175 HC* ***(refd)***
C *Santha Devi Thuraisingam v. A Shanmuganathan [1990] 1 CLJ 988; [1990] 3 CLJ (Rep) 47 HC* ***(refd)***
*Soo Lina v. Ngu Chu Chiong [1992] 2 MLJ 870* ***(refd)***
*YCC v. LSY [2007] 7 CLJ 207 HC* ***(refd)***

D **Legislation referred to:**
Law Reform (Marriage and Divorce) Act 1976, ss. 89, 96

*For the husband petitioner - Paul Liong; M/s Liong & Co*
*For the wife petitioner - Meling Sambang, Assistant Director Legal Aids Bureau, Sibu*

E *Reported by Suhainah Wahiduddin*

## JUDGMENT

F **Hamid Sultan Abu Backer JC:**

**[1]** This is my judgment in respect of the application of the ex-husband seeking for an order as follows:

G … for an order that the Wife Petitioner do contribute RM450.00 or such other sum as the court may deem just and proper towards the maintenance of the 3 children and a further order that the said Great Eastern Life Assurance (Malaysia) Berhad GE Life Education Planner Policy No. 8052094-7 taken out in the name of the Wife Petitioner be varied and read as follow:

H That as a condition for the Husband Petitioner continuing to pay the premiums for the Great Eastern Life Assurance (Malaysia) Sdn. Bhd. GE Life Education Planner Policy No. 8052094-7 taken out in the name of the Wife Petitioner for the life of the child of the family, GABRIELLE LAU SING JIEH, the Wife
I Petitioner expressly consents and agrees that the said Great Eastern Life Assurance (Malaysia) Berhad GE Life Education

Planner Policy No. 8052094-7 be varied to the sole name of the Husband Petitioner or the joint-name of the Husband Petitioner and/or the Wife Petitioner. The Wife Petitioner shall not surrender the said insurance policy during the tenure of the same in the event that there is any payment from this policy to the Wife Petitioner, the Wife Petitioner shall forthwith forward the whole sum to the Husband Petitioner for the sole benefit of the said child GABRIELLE LAU SING JIEH effective from the date of this Order.

**[2]** Grounds of the application are stated as follows:

(a) There is a material change of circumstances that the Husband Petitioner may need the Wife Petitioner to contribute to the maintenance of the 3 children given the financial status of the Husband Petitioner after the Order made on the 21st day of March, 2006.

(b) Since the Wife Petitioner is not contributing to the payment of the premiums of the said Great Eastern Life Assurance (Malaysia) Berhad GE Life Education Planner Policy No. 8052094-7 which is taken out in the name of the Wife Petitioner for the life of the child of the family, GABRIELLE LAU SING JIEH, it would only be fair and reasonable that the same be varied to the joint name of Husband Petitioner and/or the Wife Petitioner for the sole benefit of the said child as the Husband Petitioner is solely responsible for the payment of the same.

## Brief Facts

**[3]** In this case, decree absolute has already been perfected; and by the 1st consent order, the court made the following orders namely:

(a) That the said marriage may be dissolved;

(b) That there shall be no maintenance for the Wife Petitioner;

(c) That the Husband Petitioner shall have the sole custody, care and control of the 3 children of the marriage, namely, Gabrielle Lau Sing Jieh, Osrin Lau Li Shen and Quinne Lau Chin Yee, with reasonable access to the wife petitioner which shall be arranged between the petitioners;

(d) That the husband petitioner shall continue to pay the premiums for the Great Eastern Life Assurance (Malaysia) Berhad GE Life Education Planner Policy No. 8052094-7 taken out in the name of the wife petitioner for the life of

A the child of the family, Gabrielle Lau Sing Jieh, and that in the event that there is a payment from this policy to the wife petitioner, the wife petitioner shall forthwith forward the whole sum to the husband petitioner;

(e) That the costs of this petition shall be borne solely by the
B husband petitioner.

(f) That there be liberty to apply.

**Preliminary**

C **[4]** It is material to note that at the time the consent order was made no provision for maintenance was provided for the wife. The consent order by all means was largely in favour of the ex-husband. Any person conversant in the legal jurisprudence relating to law of Marriage and Divorce would say the order is not at all
D favourable to the wife petitioner, more so when, during the wedlock, the wife petitioner must have gone through great pain and suffering in giving birth to three children and taking care of them. There were no provisions made also for the sharing of matrimonial assets. Further, in making this application, the ex-
E husband had only stated his income but has not disclosed his assets which are a material consideration when dealing with such an application. In fact, I will go to the extent of saying that when an application to disturb a consent order is made and thereby to re-open old wounds, and if the ex-husband does not disclose
F material evidence and circumstances for making the application, the court must not take it lightly, if it is seen to be oppressive against the respondent. It is an abuse of process of court, serious enough to warrant a contempt proceeding against the ex-husband, on the court's own motion, to install discipline after an order for
G dissolution has been granted and duly accepted, and when the ex-husband attempts, to undermine the dignity of the court and court proceedings.

**[5] The Ex-husband's Affidavit In Support Reads As**
H **Follows:**

Pursuant to the Court Order dated 21 March 2006, I was granted the sole custody, care and control of my children name Gabrielle Lau Sing Jieh (9 years old), Osrin Lau Li Shen (4 years old) and Quinne Lau Chin Yee (3 years old) (hereinafter collectively
I called "the said children') with reasonable access to the wife petitioner. The said court order was subsequently varied by

another court order dated 17 October 2006 thereby fixing the time access to the Wife Petitioner. A copy each of the said order is annexed herewith and marked "L1" and "L2".

Due to growing age of the said children, the costs of maintaining them have also increased substantially ie, food, milk, clothing, books, stationeries, extra-tuitions, transport and care excluding my time spent on them. The particulars of the same is as follow:

| | | |
|---|---|---|
| a) | food, milk powder | RM110 |
| b) | Gabrielle tuition | RM 58 |
| c) | Quinne & Osrin's home tuition | RM180 |
| d) | Osrin's tuition fee & expenses | RM100 |
| e) | Osrin's & Quinne kindergarden fees | RM 60 |
| f) | Children's expenses like clothing, books, stationeries | RM 300 |
| g) | care taking by grandmother of the said children | RM 300 |
| | Total | **RM1,108** |

I annexed herewith sample expenditures of tuitions receipts in respect of the said children and marked 'L3'.

I also append below my own expenses (inclusive of my contribution towards the household expenses as I am staying with my parent) per month more particular are as follow:

| | | |
|---|---|---|
| a) | in-house maid | RM 500 |
| b) | blood pressure medication | RM 60 |
| c) | payment for car loan | RM 895 |
| d) | fuel for transportation | RM 280 |
| e) | Sesco and water bills | RM 500 |
| | Total | **RM2,235** |

I also bought 6 insurance policies for the benefit of my said children and the estimated monthly payment for the same is as follow:

| | | |
|---|---|---|
| a) Gabrielle insurance | RM139.80 | (marked as 'L4') |
| b) Osrin insurance | RM108.10 | (marked as 'L5') |
| c) Quinne insurance | RM100.00 | (marked as 'L6') |
| d) My insurance (88664791) | RM164.00 | (marked as 'L7') |
| e) My insurance (63597631) | RM160.00 | (marked as 'L8') |
| f) My insurance (92037149) | RM144.00 | (marked as 'L9') |
| g) Medi-care card | RM160.00 | (marked as 'L10') |
| Total | **RM975.90** | |

Hence, my estimated monthly expense is in the region of RM4318.90 per month after the said Court Order dated 21st March, 2006.

In the circumstances, I verily believe that the Wife Petitioner, whom is also the natural mother of the said children, is also under a duty to contribute to the maintenance of the said children in view of the constrained finance status as my income is RM3,000 per month.

I also applied to vary the Court order dated 21 March, 2006 as prayed for in this application on the ground that since I am ordered and responsible for the continue payment of the premium for the Great Eastern Life Assurance (Malaysia) Berhad GE Life Education Planner Policy No. 8052094-7 taken out in the name of the Wife Petitioner, it is fair and reasonable that the said insurance policy be varied to my sole name or the joint of the Wife Petitioner and/or me for the sole benefit of the said child Gabrielle Lau Sing Jieh as the same is living with me and where I am also solely responsible for the care custody of the same.

**[6]** The respondent opposes the application on the grounds; she is earning a small income and looking after her sick mother. I do not think it is necessary to set out the full facts of what the respondent says but is sufficient for the court to conclude that what ever the respondent earns, may not even be sufficient to look after her personal needs presently and in the near future as she is only having a temporary job as a clerk. The respondent submits as follows:

Under section 83 of Law Reform (Marriage and Divorce) Act 1976 stated that:

> The court may at any time and from time to time vary, or rescind, any subsisting order for maintenance, whether secured or unsecured, on the application of the person in whose favour or of the person against whom the order was made, or, in respect of secured maintenance, of the legal personal representatives of the latter, where it is satisfied that the order was based on any misrepresentation or mistake of fact or where there has been any material change in the circumstances.

In the case of *YCC v. LSY* [2006] 7 CLJ 207, his Lordship Judge Clement Skinner stated that:

> First, the Husband carries the evidential burden of satisfying the court, on a balance of probabilities, that there is a material changer of circumstances.

The Husband Petitioner did not disclose his true financial position. In the case of *YCC v. LSY* [2006] 7 CLJ 207, His Lordship held that:

> The Husband's assertion about his present financial status was equivocal and unconvincing. It did not follow as matter of course that just because there were two judgments entered against him and he had an overdraft at his bank, the husband was in dire straits. Whether he was or not depended on his earnings and sources of income and how his business were doing: what his other liabilities were and what other assets and investments he owned, not only in Malaysia but elsewhere. No genuine attempt had been made by the husband to disclose to the court his true financial position.

Upon *Decree Nisi* dated on 21st Day of May 2006 the Husband Petitioner had been granted with sole custody, care and control of his 3 children. It's a husband's obligation to maintain a child of marriage ceases upon that the child attaining the age of 18 years unless the child is physically or mentally disable. This decision was held by the Federal Court in the case of *Karunairajah Rasiah v. Punithambigai Poniah* [2004] 2 CLJ 365, which referred to case of *YCC v. LSY* [2006] 7 MLJ 137.

Therefore based on the above case, I submitted that the Husband Petitioner did not have any merit in the application to the said order. I also contended that there is no material change in circumstances in his application.

A

## The Law

**[7]** As a general rule, consent order cannot be set-aside, varied or discharged. Though, there are statutory exceptions to this rule in matrimonial matters, it is incumbent on the court as a matter
B of public policy to ensure that the issues are not re-litigated again; and again and in this case within less than two years after the consented divorce petition was allowed. This is in line with the concept of 'clean break' principles advocated in a number of cases (see *Minton v. Minton* [1979] 1 All ER 79). There are one or two
C exceptions to 'clean break' concept. For example, consent order for a property settlement is a final order (see *Soo Lina v. Ngu Chu Chiong* [1992] 2 MLJ 870). However, if the said consent order is inextricably interwoven with the maintenance order, the court has discretion to amend. In *YCC v. LSY* [2006] 7 CLJ 207 Justice
D Clement Skinner articulated the proposition as follows:

> … So it is evident from what is stated there that the husband had agreed to buy the Singapore apartment for the wife in settlement of all future claims to maintenance by her. When that obligation became a term of the order of 20 April 2001, it did
E not lose its character even though it was not expressed in the form of a payment in cash over a period of time. Being an order for maintenance, it is my view that irrespective of the fact that it was a consent order, paragraph 1(c) of the order of 20 April 2001 is amenable to being varied or rescinded under s. 83 of the
F Act …

**[8]** Sections 89 and 96 of LRA 1976 give the court the discretion "to decide all questions relating to the upbringing and education of the child" but "subject to such conditions as the court may think fit to impose' by varying or rescind any subsisting
G maintenance order for periodical payments for the children, where there is any material change in the circumstances. These sections were considered by the Supreme Court in the case of *Gisela Gertrud Abe v. Tan Wee Kiat* [1986] 2 CLJ 202; [1986] CLJ (Rep) 133 where George Seah SCJ observed:

H

> In our opinion, the answer to this submission depends upon the true construction to be given to ss. 83 and 96 of the Law Reform (Marriage & Divorce) Act 1976. (hereinafter referred to as the Act). It is common ground that these sections give to the court a
I general power to vary or rescind any subsisting periodical payments for the wife (s. 83) and/or the children (s. 96) of the marriage where it is satisfied that it was based on any misrepresentation or mistake of fact or where there has been any material change in the circumstances.

Now to "rescind" means to abrogate, annual, revoke, cancel, discharge or to put an end to altogether. It follows that when a maintenance order is rescinded by a court order it ceases to exist henceforth. Adopting this interpretation, we are constrained to hold that the general power contained in ss. 83 and 96 of the Act does not empower the court to make an order discharging the maintenance order for a limited period of time. That however, is not the end of the matter. It seems to us that the learned Judge did not intend to abrogate the maintenance order altogether as it was clear from the latter part of the court order that it was to take effect at a reduced rate of RM800 per month from 6 January 1984 to 31 May 1985 and thereafter at RM400 each month from 1 June 1985 onwards. It appears to us that the learned Judge has intended the maintenance order to be suspended during the period when the respondent was unemployed after having been retrenched by his employer from 6 June 1983 to 5 January 1984. The question we have to determine was whether or not the court had the power to do so under ss.83 and 96 of the Act? In our opinion, the word to "vary" should be given a wide meaning and should not be confined only to increase or reduce the amount of the periodical payments or maintenance for the wife and/or the children of the marriage but also to include power to "suspend" the maintenance order or any provisions therein temporarily and to revive the operation of the maintenance order or any provisions so suspended. Applying this to the facts therein we rule that the learned Judge had the power under the provisions of ss. 83 and 96 of the Act to make an order suspending the operation of the order to maintenance during the period from 6 June 1983 to 5 January 1984 respectively.

**[9]** For generations it has been an accepted norm that the duty to maintain the children falls on the father. The above sections were not meant to give some new rights to the father but it was meant to assist the mother who has custody and control of the children to seek for further maintenance if necessary. That does not mean that the father cannot rely on the section though it was not strictly meant to be so. Support for my proposition can be garnered from a number of cases. In *Parkunan Achulingam v. Kalaiyarasy Periasamy* [2004] 7 CLJ 175 it was stated:

In determining the amount of maintenance to be paid, the assessment is based primarily on the means and the needs of the parties. The needs of the party seeking maintenance is the crucial factor for providing the maintenance. In deciding the quantum of maintenance, the capacity of the husband, his ability to pay and the realities of the husband or parties financial position should be

taken into account. One other factor, the potential earning of the applicant should also be considered. The power to award maintenance to the wife is clearly provided by s. 77 of the Law Reform (Marriage and Divorce) Act 1976 ("LRA"). Section 78 of the LRA provides that in assessing the amount of maintenance to be paid by a man to his wife or former wife, "the court shall base it's assessment primarily on the means and needs of the parties, regardless of the proportion such maintenance bears to the income of the husband, but shall have regard to the degree of responsibility which the court apportions to each party for the breakdown of the marriage.

**[10]** Courts have also set down clear guidelines when dealing with such an application, to vary an existing order for maintenance. In *Santha Devi Thuraisingam v. A. Shanmuganathan* [1990] 1 CLJ 988; [1990] 3 CLJ (Rep) 47 the court stated:

Before I proceed to scrutinise the two versions presented by the parties, it is useful to remind myself of the following advice of the Supreme Court (which I have briefly adverted to earlier) in *Gisela Gertrud Abe v. Tan Wee Kiat* [1986] CLJ (Rep) 133 at 137:

> In our opinion, when an application is made to the court to vary an existing order for maintenance, the proper approach is to start from the original order and see what changes financial or otherwise, have taken place since that date including any changes which the court is required to have regard to under s. 78 of the Act as well as any increase or decrease in the means of either of the parties to the marriage and make adjustments roughly in proportion to the changes, if that is possible.

I shall start with examining the facts and circumstances on which the original maintenance order was made. In granting the said order the learned Judge must have taken into consideration that it is the duty of a parent to maintain or contribute to the maintenance of his or her children whether they are in his custody or her custody either by providing them with such accommodation, clothing, food and education as may be reasonable having regard to his or her means and status in life or paying the cost thereof – see s. 92 of Act 164. In considering the maintenance of the wife the learned Judge must also have taken into consideration the matters set out in s. 78 of the said Act which says that in assessing the quantum of maintenance the court shall base its assessment primarily on the means and needs of the parties regardless of the proportion such maintenance bears to be income of the husband or wife as the case may be.

**[11]** I have read the application, affidavits and submissions of parties in detail. I take the view that the application must be dismissed. My reasons are as follows:

(i) As a general rule, consent order even in a divorce matter must be rarely disturbed unless there are exceptional circumstances and that too clearly stated in the affidavit to warrant the intervention of the court for the benefit of the minor children.

(ii) In this case, the consent order was made less than two years ago and the ex-husband has not demonstrated in the affidavit any material change of circumstance to vary the order, taking into consideration there is a greater duty and responsibility for the father to maintain his children.

(iii) I find that the ex-husband has not disclosed his assets, movable and immovable and this material non-disclosure warrants the court to dismiss the application *in limine*.

(iv) After reading the affidavits and the previous consent order, I take the view that the ex-husband's application is not only oppressive against the ex-wife, but is an abuse of process and warrants the court to initiate contempt proceeding on its own motion, as such non-disclosure of assets as well as the application without justifiable reasons attempts to undermine the dignity of the court and court proceedings. I shall take the liberty to deal with this issue at the court's own pace.

**[12]** For reasons stated above, I dismiss the application with costs to the respondent. The getting up fees shall not exceed RM10,000. In the event the respondent has agreed to pay higher legal costs to the respondent's solicitor, the applicant shall pay the full costs on the full indemnity basis to the respondent. If costs cannot be agreed the respondent is at liberty to tax the costs. The deputy registrar shall take note of this judgment when dealing with taxation of costs.

I hereby order so.